Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
Sprint Communications Company, L.P.	)	**CC Docket No. 98-62**
Petition For A Declaratory Ruling To Declare Unlawful Certain RFP Practices By Ameritech	)	

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"),[1] through undersigned counsel and pursuant to *Public Notice*, DA 98-849 (released May 5, 1998), hereby supports the Petition for Declaratory Ruling filed by Sprint Communications Company, L.P. ("Sprint") in the captioned proceeding on April 28, 1998. In its Petition, Sprint seeks a declaratory ruling that certain "teaming arrangements" that Ameritech has proposed to enter into with one or more providers of interLATA telecommunications services violate the restrictions imposed by Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"), on Bell Operating Company ("BOC") provision of in-region, interLATA service, as well as the equal access

[1] A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services.

and nondiscrimination requirements referenced in Section 251(g) of the Act.[2] TRA agrees with Sprint that the Ameritech "teaming arrangements" are violative of the Act and, accordingly, urges the Commission to grant Sprint's Petition and to order Ameritech, as requested by Sprint, to cease and desist from participating in such unlawful "teaming arrangements."

Under the Ameritech "teaming arrangement" identified by Sprint and apparently implemented by Ameritech, Ameritech will promote, market and sell the interLATA services of an interexchange carrier ("IXC") partner in conjunction with Ameritech's local exchange, intraLATA toll and other services. As part of this "teaming arrangement," the IXC partner will agree to cap key residential, business and other rates at levels specified by Ameritech, and Ameritech will bill for its IXC partner's services pursuant to a mandatory billing and collection agreement. Indeed, Ameritech will even dictate to its IXC partner such ancillary pricing terms as peak and off-peak hours and minimum and incremental billing periods.

Ameritech will be the customer service contact for the interLATA customers of its IXC partner which Ameritech secured. Ameritech will also undertake third party verification with respect to all service orders submitted on behalf of such customers. Ameritech will be reimbursed by its IXC partner for expenses incurred by Ameritech in marketing the IXC partner's interLATA services on a "per-customer" acquired or reacquired basis, with different "reimbursement" schemes established for business and residential users. To facilitate these efforts, the IXC partner will provide

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[2] 47 U.S.C. §§ 251(g), 271; Pub. L. No. 104-104, 110 Stat. 56, §§ 101, 151 (1996). It should be noted that the "teaming arrangement" reflected in the Ameritech "Request for Proposal" ("RFP") attached to the Sprint Petition has been superseded by arrangements that Ameritech has actually entered into with at least one interexchange carrier ("IXC"), and is apparently offering to enter into with selected other IXCs. Conceptually, the RFP and the subsequent agreements are comparable; certain details, however, have changed. When TRA refers to the Ameritech "teaming arrangements herein, it is referring to the actual agreements rather than the RFP.

Ameritech with a both a current end user data file, s well as a daily data file identifying customers who have "de-PICed" the IXC's interLATA service.

Upon termination or expiration of the "teaming arrangement," Ameritech will be contractually authorized to contact those customers of its IXC partner which it had obtained for the IXC partner's interLATA services. More critically, Ameritech will not be precluded from marketing its own services to such customers. And among the services which Ameritech would be entitled to offer to these "in-region" customers would be its in-region, interLATA services.

Section 271 of the Act codifies the Modification of Final Judgment's ("MFJ") prohibition on BOC provision of in-region, interLATA services. As described by the Commission:

> [t]hrough the competitive checklist and other requirements of Section 271, Congress has prescribed . . . a mechanism [which] replaces the structural approach contained in the MFJ by which BOCs were precluded from participating in [the 'in-region long distance market']. Although Congress replaced the MFJ's structural approach, Congress nonetheless acknowledged the principles underlying that approach -- that BOC entry into the long distance market would be anticompetitive unless the BOCs' market power in the local market was first demonstrably eroded by eliminating barriers to local competition.[3]

As Sprint correctly notes, Federal District Court Judge Harold H. Greene long held in applying and enforcing the MFJ that the prohibition against BOC provision of interLATA services subsumed not "merely . . . transmissions from a point in one exchange area to a point in another exchange area, but also . . . activities that comprise the business of providing interexchange service."[4]

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[3] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543, ¶ 18 (1997).

[4] United States v. Western Electric Co., Inc., 627 F.Supp. 1090, 1099 (D.D.C. 1986), *app. dismissed in rel. part* 797 F.2d 1082 (D.C.Cir. 1986), *cert. denied* 480 U.S. 922 (1987).

Among the "related activities" encompassed within "the business of providing interexchange services," Judge Greene expressly identified "the selection of interexchange carriers" and "the marketing of services of interexchange carriers."[5]

Key to this assessment was the MFJ's reference to the provision of "interexchange telecommunications services," rather than the mere offering of "interexchange telecommunications."[6] As Judge Greene explained, "[i]nterexchange transmission capacity is transformed into an interexchange . . . business by the performance of functions that are normally and necessarily performed by those who are engaged in the business."[7] Among the functions Judge Greene pointed to as "integral parts of the interexchange business" were "making selections of interexchange capacity," "marketing interexchange services," and providing customer service in conjunction with interexchange services.[8] Moreover, Judge Greene made clear that the term "provide" in the context of the MFJ "was synonymous with furnishing, marketing, . . . [and] selling."[9]

The "teaming arrangement" proposed and implemented by Ameritech contains many, if not all of the indicia of "the business of providing interexchange service." As noted above, Ameritech will market the interLATA services of its IXC partner, facilitated in such efforts through

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5 Id; United States v. Western Electric Co., Inc., 673 F.Supp. 525, 541, fn. 69 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C.Cir. 1990), *cert. denied sub nom* MCI Communications Corp. v. United States, 498 U.S. 911 (1990).

6 United States v. Western Electric Co., Inc., 627 F.Supp. 1090 at 1099.

7 Id. at 1100.

8 Id. at 1100 - 1103.

9 United States v. Western Electric Co., Inc., 675 F.Supp. 655, 665 (D.D.C. 1987), *aff'd* 894 F.2d 1387 (D.C.Cir. 1990).

access to confidential information provided by its IXC partner. Ameritech will effectively set the price, and key terms and conditions, of its IXC partner's interLATA service. Ameritech will bill for its IXC partner's interLATA services. Ameritech will provide the exclusive interface with those of its IXC partner's interLATA customers which it secured, performing all customer service functions for these customers. Ameritech will even perform such ancillary services as third party verification of telemarketing and other sales. In other words, Judge Greene clearly would have struck down Ameritech's "teaming arrangement" as violative of the MFJ's ban on BOC provision of interLATA services. Section 271, as the successor of this MFJ provision, demands no less.

Notwithstanding the above, the Commission is correct that "section 272(g) is silent with respect to the question of whether a BOC may align itself with an unaffiliated entity to provide interLATA services prior to receiving section 271 approval."[10] TRA submits, however, that this silence damns the Ameritech "teaming arrangement." When Congress desired to authorize BOCs to engage in "joint marketing" and "teaming arrangements" with unaffiliated entities with respect to activities that had been or once were prohibited by the MFJ, it expressly authorized such activities. Thus, for example, Section 274(c) of the Act provides for joint marketing of electronic publishing services by BOCs and unaffiliated entities, and sanctions "teaming arrangements" between BOCs and unaffiliated entities for such purpose.[11] And, perhaps more tellingly, that authorization contains

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[10] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd. 21905, ¶ 293 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *pet. for rev. pending sub nom.* SBC Communications Corp. v. FCC, Case No. 97-1118 (D.C. Cir. Mar. 6, 1997), *remanded in part sub nom.* Bell Atlantic Tel. Cos. v. FCC, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand* FCC 97-222 (released June 24, 1997), *aff'd sub nom* Bell Atlantic Tel. Cos. v. FCC, Case No. 97-1067 (D.C. Cir. Dec. 23, 1997).

[11] 47 U.S.C. § 274.

a number of key restrictions on BOC participation, indicating that absent the express grant of authority, no such joint marketing or "teaming" would have been permissible. Given the broad scope of the MFJ restriction on BOC provision of interLATA services that has been codified in Section 271, TRA submits that a like express authorization would have been necessary to permit the "teaming arrangement" proposed here by Ameritech.

While it does not believe that any "teaming arrangement" involving BOCs in the business of providing in-region, interLATA services can pass statutory muster until the BOC has secured authority under Section 271 to provide such services, TRA certainly agrees with the Commission that with respect to any "teaming activities," the "equal access requirements . . . that were imposed by the MFJ remain in effect until the BOC receives section 271 authorization."[12] Under Section 251(g) of the Act, incumbent LECs must provide "exchange access . . . in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations . . . that appl[ied] to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission." Hence, Ameritech, at a minimum, would be required to offer to enter into the same "teaming arrangement" with all IXCs in order to avoid discrimination and ensure maintenance of equal access.

Ameritech, of course, cannot lawfully do this, which confirms that the "teaming arrangement" proposed by Ameritech is itself unlawful. If Ameritech were to enter into "teaming arrangements" with all or most IXCs, it would effectively be setting the price, and key terms and

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[12] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd. 21905 at ¶ 293

conditions, for interexchange service in its region and hence throughout the nation. Ameritech would be billing for and providing customer service with respect to a disproportionate percentage of the interLATA services originated in its region. Indeed, Ameritech would be the primary entity with which customers dealt with respect to interLATA service within its region. Certainly, this type of pervasive impact confirms that the proposed "teaming arrangements" would place Ameritech squarely in the business of providing interexchange services, not to mention in dangerous antitrust waters.

Finally, TRA submits that from a public policy perspective, it would be counterproductive to permit Ameritech to enter into the proposed "teaming arrangement." As the Commission has recognized, Section 271 was enacted to provide BOCs, which have "little, if any, incentive to assist new entrants in their efforts to secure a share of the BOCs' markets," with some reason to open the local exchange/exchange access market to competition.[13] Through Section 271, "Congress required BOCs to demonstrate that they have opened their local telecommunications markets to competition *before* they are authorized to provide in-region long distance services."[14] "Section 271 thus creates a critically important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications market."[15]

The "teaming arrangement" proposed by Ameritech would effectively allow Ameritech to build an in-region, interLATA customer base for itself without first satisfying the

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[13] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 at ¶ 14.

[14] Id. (emphasis in original; footnote omitted).

[15] Id. (footnote omitted).

requirements of Section 271. Ameritech would have been the entity with which the interLATA customers would have been dealing and from which they would have been receiving bills. The interLATA service would have been priced and structured in a manner consistent with Ameritech's business objectives. And Ameritech's presence in the interLATA market would have been visibly established through its sales and marketing activities. With this foundation established, Ameritech, as noted above, would be contractually entitled upon termination of the "teaming arrangement" to contact and secure as customers for its own in-region, interLATA service all of the customers it had secured for its IXC partner and with whom it had been dealing exclusively.

In other words, Ameritech's "teaming arrangement" is a "Trojan Horse" through which Ameritech can effectively enter the in-region, interLATA market without first opening its local markets to competitive entry. At such point as it is authorized by either Congressional or Commission action to provide in-region, interLATA service, Ameritech will have already developed a substantial interLATA customer base, not having been hindered in the least by its failure to have earlier satisfied the requirements of Section 271.[16] Obviously, the "critically important incentive" that Section 271 was intended by Congress to provide would be lost in such a circumstance.

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to issue, as requested by Sprint Communications Company, L.P., a declaratory ruling that certain "teaming arrangements" which Ameritech has proposed to enter into with providers of interLATA telecommunications services violate the restrictions imposed by Section 271 on BOC

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[16] The value of this "customer base in waiting" is confirmed by the absence of any apparent direct compensation for Ameritech in its proposed "teaming arrangement." While Ameritech will be reimbursed for certain marketing expenses, it apparently will not be compensated for securing customers for its IXC partner. But then again, Ameritech, in reality, is obtaining customers for itself, not its IXC partner.

provision of in-region, interLATA service, as well as the equal access and nondiscrimination requirements referenced in Section 251(g) of the Act. TRA further urges the Commission, again as requested by Sprint, to order Ameritech to immediately cease and desist from participating in such unlawful "teaming arrangements.".

Respectfully submitted,

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June 4, 1998

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CERTIFICATE OF SERVICE

I, Catherine M. Hannan, hereby certify that a true and correct copy of the foregoing Comments on Sprint Communications Company L.P.'s Petition for Declaratory Ruling Re. Ameritech RFP Practices has been served by United States First Class Mail, postage prepaid. to the individuals listed below, this 4th day of June, 1998:

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